No. 99-519

IN THE

Supreme Court of the United States

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL JONES; KAREN PIERCE and CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO; KATHY LIBICKI and EL DORADO COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The petition for certiorari presents an incomplete and misleading analysis of similar holdings by the Court of Appeals and District Court on the issue of petitioners' want of standing to challenge the indemnity agreement between the public employees' union and the public employer, and overstates the importance of these holdings to anyone besides the parties. As described herein, certiorari should be denied in this case because:

(1) The decisions of the Court of Appeals and District Court holding that petitioners' lack standing to challenge the indemnification agreement between the public employee union and the employer are correct;

(2) The alleged conflict between the circuits on the validity of indemnification agreements between public employers and unions are not true conflicts, but ones based upon incomplete analyses and peculiarities of those cases; and

(3) To the extent there is an apparent conflict on the validity of indemnification agreements between the circuits, the issue of their validity requires further study by the lower courts before it is addressed by this Court.

STATEMENT OF THE CASE

Petitioners are nonunion agency fee payers who filed a federal civil rights action contesting the adequacy of the union's notice to them under *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The gravamen of their complaint is that the respondents' notice did not comply with the requirements of *Hudson*; specifically, that though respondent union "did give a rather detailed notice and a goodly amount of explanation of the fee to the nonmember fee payers," (App. 6a) the financial statement accompanying the notice was not properly *verified*.

The district court found that financial review by an accountant, which is what respondents provided in their notice to petitioners, was adequate to satisfy the requirements of *Hudson*, but the court of appeals reversed stating "that what is required is a real independent verification of the financial data in question." (*Id.* at 8a.) Accordingly, respondent Public Employees Union, Local No. 1 (PEU), has since prepared a verified financial audit of "chargeable" versus "non-chargeable" expenses for the current year and included it with an amended notice served on petitioners.[1] Respondent union has also refunded to petitioners all of the agency fees collected from them for the time period covered by their complaint — i.e., from May 1995 to the present. This total amount was about $3000. (*Id.*)

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1. Defendants' Memorandum of Points and Authorities in Opposition to the Motion for Preliminary Injunction, filed October 1, 1999 in U.S. District Court, E.D. Cal., No. Civ-S-95-1859, LKK and attached exhibits. See also Order of Court denying Plaintiffs' Motion for Preliminary Injunction, filed November 17, 1999.

The district court and court of appeals found against petitioners on their claims for complete restitution of their agency fees, invalidation of the escrow account procedure used by respondent union in response to a fee challenge, and the validity of the indemnification agreement between respondent union and the public employer. This last issue — the validity of the "hold harmless" agreement — was based on petitioners' lack of standing. It is in regard to these judicial decisions that petitioners state that "[t]he district court and court of appeals decided most of the [petitioners'] . . . claims and entered judgment largely in their favor, but not on the claim presented in this Petition." (Pet. 3.)

Petitioners seek review to determine the legality of the indemnification or "hold harmless" agreement between PEU and the employer, El Dorado County. They contend that this indemnification agreement is unconstitutional because it is void as against public policy. The district court opined that this issue "raises a number of subtle and difficult questions," including

> [I]s this a question of federal law since it arises in the context of procedures mandated by the Supreme Court as implementing First Amendment rights, or state law since a California contract is in issue; in either event, how is public policy to be discovered, i.e., if federal law, is it a matter of federal common law requiring an examination of the common law as it stood at the time of the adoption of § 1983, *see, e.g., Pierson v. Ray*, 386 U.S. 547 (1967) (§ 1981 applied against the backdrop of tort law at the time of its adoption), or if state law, what doctrines of state public policy are in issue? (App. 33a.)

"Happily," the court concluded, it need not decide this question because petitioners "have failed to show that they have standing to raise the issue." (App. 34a.) They lack standing, the court stated, because any injury they have suffered "is the result of the Union's conduct, and is traceable to the hold harmless agreement in only the most indirect fashion." (*Id.*) Indirect injury is, to be sure, insufficient. In reaching this result, the district court relied upon *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997), *cert. denied sub nom., Anchorage Education Association v. Patterson*, 523 U.S. __, 118 S. Ct. 2060 (1998) for the proposition that petitioners' assertion that the "employer 'felt freer' to shirk its duty to its employees" because of the indemnification agreement, was "insufficient, without more, to establish an injury." (*Id.*)

Similar reasoning was invoked by the Court of Appeals to reject petitioners' standing:

> While it can be assumed that [petitioner] suffered some injury when the fees were deducted from his paycheck, that is all he has shown. He certainly cannot show any connection between the indemnification agreement and that injury. The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs — on the union, which seeks the fees. Just how any injury can be traced to the indemnification provision itself is entirely unclear, but for [petitioners'] claim that the provision will somehow cause the County to ignore its own duties. But that argument is no more than rank speculation, and any breach of the County's duty can hardly be said to be traceable to the indemnification provision itself.

(App. 16a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision That Petitioners Lack Standing to Challenge The Indemnification Agreement Between The Public Employee Union And The Employer Is Correct Because There is No "Harm" To Them from the Agreement.

Petitioners object that the district court did not reach the merits of their attack on the hold harmless agreement between El Dorado County and PEU on the ground that petitioners lacked standing to raise it. They are particularly upset that the court did this *sua sponte*: "While respondents . . . addressed the merits of the [petitioners'] argument in their opposition . . . , and attacked the [petitioners'] claim on the merits . . . , the record in the district court is *absolutely devoid* of argument on the issue of [petitioners'] standing to raise this element of their claim." (Pet. 5-6; italics original.) "[T]he district court's determination that the [petitioners] lacked standing was made *sua sponte*, without any warning whatsoever." (*Id.* at 14.) But there is no requirement that a court abstain from reaching a standing issue if it is not raised by a party, or that it give notice to claimants that it intends to do so. To the contrary, "[a]lthough raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in the District Court." (*Juidice Judges v. Vail*, 430 U.S. 327, 331 (1977), *citing North Carolina v. Rice*, 404 U.S. 244 (1971); and *O'Shea v. Littleton*, 414 U.S. 488, 493-498 (1974).)

The key to the "standing" question is, of course, ascertaining whether the conduct complained of harms or

sufficiently threatens to harm petitioners. (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992).) Both the district court and court of appeals found that petitioners suffered insufficient harm to confer standing upon them to challenge the indemnity agreement between respondent public employer and the union. Petitioners nevertheless continue to contend that the species of harm they suffer is twofold: (1) the increased risk of future violations of their constitutional rights by illegal agency fee seizures in the absence of compliance with *Hudson*'s requirements; and (2) the forcing of petitioners to subsidize the public employer's defense against their meritorious lawsuit to vindicate their constitutional rights for violations that already have occurred.

Neither sort of injury is palpable; both are, as the courts below found, "speculative." As to the first supposed injury — the increased risk of future violations of petitioners' constitutional rights — the record shows that respondent union promptly complied with the Court of Appeal's ruling that it needed to obtain a verified audit of chargeable versus non-chargeable expenses, refunded all of petitioners' agency fees collected during the time period at issue, and modified its notice to agency fee payers to assure that it was in conformity with *Hudson*'s requirements as delineated by the appellate court's opinion. (*See ante* at n.1.)[2] This is not the conduct of a scofflaw that evinces a present or likely threatened future injury to petitioners' First Amendment

2. These facts were taken into account by the district court when it denied petitioners' motion for a preliminary injunction to enjoin respondent union from collecting agency fees. Petitioners claimed that respondent union's notice and procedural safeguards did not comply with the Ninth Circuit's opinion in this case (Order of Judge Lawrence K. Karlton, U.S. District Court, Civ. S-95-1859, dated November 17, 1999.)

rights. And the argument that petitioners will, unless the indemnification agreement is struck down, be "compelled to subsidize the public employers' defense against their meritorious lawsuit" (Pet. 9-10) assumes facts not yet in evidence. Specifically, it assumes that the union's defense of the employer's liability to petitioners for the agency fee dispute is not properly "chargeable;" and that whether it is or not, respondent union has "charged" or will charge petitioners for that defense. Since petitioners have been refunded all of their agency fees up to the present, and have not filed any new challenges to the respondents' agency fee practices, it is difficult to imagine how they could claim they have or will be "charged" for this expense. Whether respondent union's defense of the employer in this action is properly chargeable to agency fee payers is a question not now before the Court; and deciding it under the guise of determining the validity of the indemnification agreement is an unusual extrapolation of judicial decision making for the Court to entertain.[3]

Petitioners tortuously stretch language in a footnote from *Hudson*, *supra*, 475 U.S. at 307 n.20 to make the district and appellate court opinions in this case seem in conflict

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3. It is well-settled that "the expenses of litigation incident to negotiating and administering the [collective bargaining] contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative." (*Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984).) Petitioners herein seek to bootstrap the question of whether the litigation expenses incurred in the defense of their lawsuit by respondent union are properly "chargeable" to the issue of the indemnification agreement's validity. But the issue of whether these expenses are properly "chargeable" is best left to the district court after development of a record that does not now exist on this question.

with this Court's holding in that case. But *Hudson*'s notation that "the government *and* union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights]" (Pet. 15, italics added.) cannot logically be equated with any disapproval by this Court of public employer–union indemnification agreements, especially since no indemnification agreement was at issue in *Hudson*. Nor do the remarks in *Lehnert v. Ferris Facult Ass'n*, 500 U.S. 507, 531 (1991) that disapprove of charging objecting nonmembers for "the expenses incident to [an illegal] strike" have any relevance to the challenged indemnification agreement. (Pet. 17.) The two happenings — an illegal strike and an indemnification agreement — are not analogous. Any supposed equation of the two becomes even more problematic given that *Lehnert* also held that *all* strike preparation expenses are properly "chargeable," even if the anticipated strike would be illegal. "The Court reasoned that strike preparation activity is 'an effective bargaining tool' and thus germane to collective bargaining activities." (Calvin Siemer, *Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members* — Much A-Dues About Nothing?, 60 *Fordham L. Rev.* 1057, 1073 (1992).) Certainly if preparation for an illegal strike is "chargeable," and thus not "harmful" to objecting agency fee payers, it is difficult to imagine why defense of a "hold harmless" agreement could logically be found to be injurious to petitioners.

No, petitioners lack standing because they cannot show an injury sufficient to satisfy its strictures. Only three of the eight cases cited by petitioners that address the validity of public employer-union indemnification agreements mention standing. Two of these are the appellate and district court opinions in this case which explicitly discuss and analyze

the standing issue; the other is *Hohe v. Casey*, 956 F.2d 399, 411 (3rd Cir. 1992), which stated only that the plaintiff agency fee payers advanced a theory that "raises a cognizable legal issue." This, as the Court of Appeals in this case noted, was a "suggestion" that there was standing, not a decision on the issue. (App. 17a, fn.7). Significantly, *Hohe* upheld the validity of the indemnification agreement because "even if [the union] would indemnify the [public employer] for such costs and fees under the [agreement], we do not believe that this should matter."

> Nonmembers will be able to collect costs and fees. Moreover, the exclusive representative, upon whom most obligations fall, has a significant incentive to ensure that its procedures comply with the Constitution. Failure to do so may result in its being unable to retain a portion of the fair share fee. Thus, we hold that the invalidation of the indemnification clause is not required by the First Amendment.

(*Id.* at 412.) In other words, "no harm, no foul."

Petitioners concede that the conclusion by the court in *Hohe* about the lack of harm flowing from the indemnification agreement to the agency fee paying challengers "is a virtually explicit reference to the second of the three requirements necessary to establish 'standing,' *i.e.*, that 'there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly . . . trace[able] to the challenged action of the defendant.' " (Pet. 20.) *Hohe* is, then, ultimately consistent with the opinions in this case on the critical point: there is no injury

that can be shown to befall petitioners from the existence of the indemnification agreement.[4]

Now, the remaining five opinions cited by petitioners invalidate the indemnification agreements but do not explicitly mention or discuss standing. They are not, then, "standing" decisions, and cannot be in conflict with the standing decisions in this case or with *Hohe*'s suggestion about "standing."[5] These

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4. Perhaps the *Hohe* appellate opinion reached the merits of the indemnity agreement because the plaintiffs raised several other challenges to the agency fee payer mechanism about which they clearly possessed standing and, having reached those issues, the court understandably felt it would not have been in the interest of judicial economy to abstain from deciding the validity of the hold harmless agreement. That, after all, would most likely spawn new "spin off" litigation to resolve the undecided issue. Once *Hohe* got there on the merits, however, the analysis and conclusion that no harm can be traced from the agreement itself to petitioners can be related back to the threshold "standing" issue where it becomes obvious that a necessary element for standing is missing.

5. Petitioners, aware that the cases going their way do not discuss "standing," nonetheless try to characterize them as opinions on "standing" by stating that they are "implicit standing" decisions. "Implicit in any federal court's merits determination is a finding that the parties before the court possess the requisite standing." (Pet. 21.) But A

> decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given.

(H. Black, *Law of Judicial Precedents* 37 (1912).) Not surprisingly, the case law is silent about any doctrine of "implicit standing."

five cases, four from the Sixth Circuit and one from the Second, reach the merits of the indemnification agreements and find them void as against public policy. Why? Because the agreements supposedly harm petitioners. How?

> The [public employer] defendants, through their indemnification agreement with [the union], have effectively destroyed the only realistic motivation an employer has to ensure an agency fee plan is constructed and administered correctly. By agreeing to indemnify the [public employer] for any constitutional deficiencies in their agency fee plan, [the union] enables them to escape liability for any action instituted by an employee challenging the validity of the agency fee plan.

(*Weaver v. Univ. of Cincinnati*, 764 F. Supp. 1241, 1247 (S.D. Ohio 1991), *aff'd in part*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied sub nom*, *Weaver v. Steger*, 507 U.S. 917 (1993).)

But this supposed species of harm, which petitioners herein allege, is devastatingly dispelled by the analysis in *Hohe* and the Court of Appeals' opinion in this case. *Hohe* reasons that it simply isn't true that an indemnification agreement will tend to make the public employer shirk responsibility to his employees because "[n]on-members will be able to collect costs and fees, [and] the [union], upon whom most obligations fall, has a significant incentive to ensure that its procedures comply with the Constitution. Failure to do so may result in its being unable to retain a[6]

6. The Court of Appeals was prescient in its observation that another powerful incentive for the union to follow constitutional procedures in collecting agency fees is that a "failure to comply may also involve the union in substantial and expensive litigation, (Cont'd)

portion of the fair share fee." *(Hohe, supra*, 956 F.2d at 412.) As the Court of Appeals herein stated:

> The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs — on the union, which seeks the fees. Just how any injury can be traced to the indemnification provision itself is entirely unclear, but for [petitioners'] claim that the provision will somehow cause the [public employer] to ignore its own duties. But that argument is no more than rank speculation, and any breach of the [employer's] duty can hardly be said to be traceable to the indemnification provision itself.

(177 F.3d at 1112.)

Petitioners even try to create an apparent conflict within the Ninth Circuit on the standing issue by telling us that *Knight v. Kenai Peninsula Borough School District, supra,* 131 F.3d at 807 is a "standing" case, or at least can be viewed through petitioners' prism as a standing case. It is not, and no rational view can yield that result. *Knight* relied upon the doctrine of "ripeness" to decline to reach the issue of the validity of the indemnification provision.[7] In doing so it

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(Cont'd)
witness this case which has been in progress for over three years and will not be over for some time yet." (*Prescott*, App. 17a.) Petitioners' motion for attorney fees and costs for the appeal alone seeks over $37,000. (Petition for Attorneys' Fees and Expenses on Appeal, *Prescott v. County of El Dorado*, 9th Cir. No. 98-15579, filed on or about July 12, 1999.)

7. There is, to be sure, a close relationship between the questions of ripeness and mootness and the constitutional dimensions of the standing question. *See Warth v. Seldin* (1975) 422 U.S. 490, 499 n.10.

stated, in language remarkably similar to the requirement for "standing," that petitioners' "argument is that [defendant public agency] will feel freer to violate the constitutional rights of nonmember[s] . . . due to the indemnification clause." (*Id.* at 814.) This is also petitioners' argument as to why the indemnification clause in the instant case should be voided. (Pet. 11.) *Knight* declined to reach that argument, however, because it "contains factual assertions that cannot be assessed on the current record." (*Id.*) That reason echoes the district court's and court of appeals' views in this case that petitioners failed to make a "showing that [they have] personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." (App. 34a.)

Further, *Knight* explicitly rejects the underlying premise of petitioners' attack on the indemnity clause: that the County has a duty to its employees to assure that the notice sent to nonmember agency fee payers passes constitutional muster before it is sent. That contention was made by petitioners in the district court against a public school district, and the court bought it; but *Knight* reversed on this precise point:

> We are not persuaded that the [public employer] owes a duty of reasonable review of [the union's] *Hudson* notice before the notice is mailed. The notice is mailed directly from the [union] to the nonmembers, and the [employer] does not get involved until [the union] seeks to force a nonmember to pay a representation fee. This necessarily occurs at a substantially later time. At that later stage, the [employer] cannot take adverse action against the nonmember employee without first ensuring that the nonmember's

> constitutional rights were not violated by [the union]. [¶] Therefore, we hold that the [employer's] duty to nonmembers is to evaluate the sufficiency of the union's notice at the time the union seeks to take action against a nonmember for failure to pay the agency fee, and not at the time of the initial mailing of the *Hudson* notice.

(131 F.3d at 817.)

Thus *Knight* undercuts petitioners' premise that the indemnity clause is void as against public policy because it works against the County exercising its duty to its employees to make sure that the union's notice is not constitutionally infirm. It also corroborates the view of the Court of Appeals herein that petitioners, if they seek standing to challenge the indemnity agreement, must show that they have actually suffered some real or threatened injury as a result of the agreement. It is impossible to show any injury if the County does not, consistent with *Knight*, owe any *duty* to the nonmember agency fee payer at the stage the notice is sent to them by the union.

II. The Apparent Conflicts Between the Circuits on the Validity of Indemnification Agreements Between Public Employers and Unions Are Resolvable When The Decisions are Placed in Proper Context.

Petitioners would have the Court believe that true conflicts of great importance to the public exist between the circuits on the validity of public employer-union "hold harmless" agreements. Examination of these cases, however, reveals that these conflicts are more apparent than real and

can be resolved or reconciled when placed in the proper jurisprudential context.

A basic starting point for contextual analysis of these cases is the nature of the agency fee amount as a subject of bargaining. Bargaining subjects are either mandatory or permissive depending on the nature of the issue. (*See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).) See generally *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).) The amount of the agency fee is not a mandatory subject of bargaining. "The amount of an agency fee concerns primarily the relationship between the union and the nonmember employees; it is not 'an aspect of the relationship between the employer and employees' . . . [and therefore] . . . is not a mandatory subject of bargaining. . . ." (*North Bay Dev. Disabilities Servs., Inc. v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).)[8] Because this bargaining subject is not mandatory, the union is not required to disclose to the employer the financial information upon which the agency fee is based during bargaining and formulation of the agreement. (*Id.* at 479.) It follows that the employer deprived of the information under these conditions should be allowed to protect itself through a valid hold harmless provision in the final agreement. The courts have not yet addressed whether a hold harmless provision is essential under these circumstances. *Weaver* did not consider *North Bay* when holding that hold harmless clauses were *per se* violative of public policy when applied to agency fee situations (*Weaver v. University of*

8. The D.C. Circuit first established that agency fees were not a mandatory subject of bargaining in 1982. *See International Union of the United Ass'n of Journeymen of Plumbing Indus. v. NLRB*, 675 F.2d 1257 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

Cincinnati, *supra*, 970 F.2d 1523), and consideration of that fact could (and should) lead to validation of indemnity agreements.[9]

In a context similar to the decision in *North Bay*, the First Circuit held that an employer could rely on the union to carry out its duty to the employee. (*Carrol v. Brotherhood of R.R. Trainmen*, 417 F.2d 1025, 1028 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).) The court explained that to prohibit the employer from relying on the union would require that in order "[t]o protect itself from . . . liability . . . an employer would be forced to ignore union representations and take the initiative in dealing with employees whenever it suspect[ed] a discriminatory motive. Such conduct would . . . have a . . . detrimental effect on labor-management relations. . . ."[10]

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9. The nonmember employee is protected, regardless of the lack of involvement by the employer, precisely because the courts have required the union to provide the employees with professionally audited financial information concerning the deduction of agency fees directly before the deduction is made. (*Hudson*, *supra*, 475 U.S. at 307 n.18.) Therefore, the union and employer usually agree that the primary duty to enforce the nonmember's rights lies with the union, and that hold harmless clauses between the union and the employer may not only be valid, but necessary given these circumstances.

10. Charles A. Edwards, *Employers' Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 *LABOR L.J.* 686, 687 (1976) (*citing Carroll v. Brotherhood of R.R. Trainmen*, *supra*, 417 F.2d at 1028 and describing the harm of holding the employer responsible for inadvertent participation in the union's discriminatory practice against an employee in an unfair representation case).

Accordingly, a possible consequence of voiding hold harmless provisions as petitioners urge, although allowing the union to withhold information concerning the fairness of pay deductions, would be the weakening of the framework upon which union-management relations are based.[11] Under these circumstances, the union would no longer operate as the sole representative of the employees because the employer would now be directly responsible for nonmember employees. The employer would be required to establish independently, and upon its own initiative, that the fees being deducted were fair to the nonmember. This may require the employer to obtain the services of an additional independent auditor to verify the fairness of the fees. (*See Hudson*, *supra*, 475 U.S. at 307 n.18.) Not only does this requirement create an insurmountable burden for the employer,[12] but also jeopardizes the constitutionality of the security arrangement. That is because the Court has found that a nonmember's rights are not violated when that employee is forced to pay his fair share of the union costs of bargaining. (*Id.*) However, should the bargaining relationship change so that the employer is charged with the duty and cost of representing the nonmember employee in the bargaining process independently, the deduction of the agency fee for this service

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11. A judicial pronouncement holding the employer liable for the accuracy of information provided to it by the union has been likened to a Damoclean sword hanging over the entire employment relationship. Edwards, *supra*, n.7, at 687.

12. The employer is not privy to all financial information held by the union and, even with an auditor, is likely to have an incomplete set of figures upon which to base the accuracy of the agency fee deduction. Only "the unions possess the facts and records from which . . . expenditures can reasonably be calculated. . . ." (*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 239-40 n.40 (1977).)

would be constitutionally questionable. Under this scenario, the union has allowed the duty of nonmember bargaining to be shifted to the employer, and therefore, should no longer be allowed to collect bargaining fees from the nonmember.[13]

To avoid a potential conflict in the employment relationship, the court in *North Bay* found an inherent protection to the employer, similar to one expressly agreed to in a hold harmless provision, in situations in which the union is allowed to withhold agency fee information from the employer. (*North Bay Dev. Disabilities Servs., Inc. v. NLRB*, *supra*, 905 F.2d at 479).) "The Employer in this case voice[d] the concern that it might be charged with an unfair labor practice if it with[held] excessive fees" in reliance on the union-provided amount to be withheld. However, the court concluded that "[t]his apprehension . . . appear[ed] . . . to be unfounded" when the employer had no reason to believe that the fee was unlawful. (*Id.*) The court emphasized that the employer is protected from charges of unfair labor practices when it relies on the agency fee deduction that is provided by the union, and therefore, would not have to initiate its own procedure for guaranteeing the accuracy of the fee.[14] (*Id.*)

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13. *See Abood*, *supra*, 431 U.S. at 232; *see also Hudson*, *supra*, 475 U.S. at 293. The Court explained in these cases that deducting fees from a nonmember's pay is only constitutional when the fees deducted are proportionate to the benefits derived from the union's bargaining for the nonmember and administering the contract.

14. To be sure, the existence of this protection does not completely relieve the employer of its duty to the nonmember employee. (*See H.C. Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201-02 (9th Cir. 1977) (suggesting that the employer cannot (Cont'd)

Circuit courts have further justified the use of hold harmless clauses between the union and the employer because insurance policies, which are analogous in purpose to indemnity agreements, are not violative of public policy. The fact that public policy dictates that coverage be excluded when an employer intentionally acts in violation of an employee's rights, serves as a deterrent to any incentive the employer may have to violate its duty to the employee. (*See Solo Cup, supra*, 619 F.2d at 1187; *Union Camp, supra*, 452 F. Supp. at 568; and *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969).)

Weaver, supra, 970 F.2d at 1536 found a shortage of published opinions dealing with the validity of indemnification of a public employer for violations of employees' rights, and therefore, chose to rely on *Stamford*

(Cont'd)
intentionally allow an employee's rights to be violated).) If the employer has "reason to believe that the fee was unlawful," and nonetheless agreed to collect it, the employer would be committing an unfair labor practice. (*North Bay, supra*, 905 F.2d at 479; *see also Helmsley-Spear, Inc. v. NLRB*, 275 NLRB 262, 268 (1985).) Public policy prohibits an employer from intentionally violating a nonmember employee's rights while relying on inherent or express protection for itself. Yet, when excess fees are deducted without knowledge of any wrongdoing, the employer is protected. (*See North Bay, supra*, 905 F.2d at 479; *see also Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1187 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980); *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969); *Union Camp Corp. v. Continental Casualty Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978) (likening indemnification to an insurance policy that would prohibit coverage when a claimant's intentional acts create the need for payment).) Prudent employers would guarantee the protection alluded to by the court by requiring that an express hold harmless provision be included in the final agreement.

Board of Education v. Stamford Education Association, 697 F.2d 70 (2d Cir. 1982) in reaching its decision. In *Stamford*, the Second Circuit held that public policy prohibited hold harmless provisions in collective bargaining agreements that were written to protect an employer from violations of federal statutorily detailed civil rights. (*Id.* at 73.) However, civil rights is vastly different from fair-share fees because, in both the Equal Pay Act and Title VII of the ~~Civil~~ Rights Act, Congress has provided a comprehensive statutory scheme that does not include contribution or indemnification. (*Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981).) The Supreme Court has explained that federal common law does not come into play when Congress has provided a "carefully considered legislative program" on a given subject matter. (*Id.*) However, Congress has not provided the same type of guidelines for dealing with hold harmless clauses pertaining to fair-share fees. When Congress has been silent on the issue, the Court has conceded that there is a "modern trend of federal court decisions favoring contribution" (*Id.* at 83) or the payment of a party's "share of the common liability." (*Id.* at 88.) More current cases take this even further, providing a foundation for the argument that federal common law may allow the union to hold an employer harmless for violations of a fair-share fee arrangement.[15] Therefore, contrary to the holding in *Weaver*, public policy should encourage rather than discourage the use of hold harmless provisions in labor agreements.

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15. *See Hohe v. Casey*, *supra*, 956 F.2d 399 (holding that hold harmless provisions do not violate public policy); see also *Solo Cup Co. v. Federal Ins. Co.*, *supra*, 619 F.2d 1178 (likening hold harmless clauses to insurance policies and finding the provisions not violative of public policy); and *Caplan v. Johnson*, *supra*, 414 F.2d 615 (holding that hold harmless clauses function as insurance policies which have been found not to violate public policy).

III. The Lower Courts Should Be Given A Further Opportunity to Resolve Any Apparent Conflict Between the Circuits on the Validity of Public Employer-Union Indemnification Agreements.

As respondents have shown (*ante*, pp. 9-13), there are matters not considered by the two circuits (i.e., the Second and Sixth) that have, without reaching the threshold issue of "standing," found the indemnity agreements in question to be void as against public policy. Consideration of these factors by future lower courts could (and should) produce different results. Moreover, no court has undertaken the kind of analysis suggested by the district court in this case, which borrows heavily from *Pierson v. Ray*, *supra*, 386 U.S. 547. That kind of analysis is warranted now that the district court has suggested it, and the circuits should be given an opportunity to develop these analyses and resolve any apparent differences between them as to the validity of public employer-union indemnification agreements. As the Court stated in *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959):

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the . . . [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

CONCLUSION

For all the reasons aforementioned, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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